STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Hon. Hilda R. Gage, Presiding Judge

SHIRLEY RORY and
ETHEL WOODS,

Plaintiffs/Appellees,

Supreme Court No: 126747

v

CONTINENTAL INSURANCE COMPANY
a CNA COMPANY,

Defendant/Appellant.

Court of Appeals No: 242847
Wayne County Circuit Court
Case No: 00-027278-CK

BRIEF OF PLAINTIFFS/APPELLEES SHIRLEY RORY AND ETHEL WOODS

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

HAKIM & TURFE
DAVID D. TURFE, (P44591)
MAROUN J. HAKIM (P28489)
Attorneys for Plaintiffs
29900 Harper Ave., Ste.E
St. Clair Shores, MI 48082
(586) 415-4900
Dated: January 31, 2005

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Statement of Jurisdiction

The jurisdictional statement in appellant's brief are complete and accurate.

QUESTION PRESENTED FOR REVIEW

APPELLANT, CONTINENTAL INSURANCE COMPANY, CONTRACTED WITH THE PLAINTIFFS FOR CERTAIN INSURANCE COVERAGES. THE UNAMBIGUOUS CONTRACTUAL LANGUAGE OF THE POLICY REQUIRES THAT INSUREDS CLAIMING UNINSURED MOTORIST'S BENEFITS MUST DO SO WITHIN ONE YEAR FROM THE DATE OF THE ACCIDENT OR BRING SUIT WITHIN ONE YEAR FROM THE DATE OF THE ACCIDENT FOR THESE BENEFITS. IT IS UNDISPUTED THAT THE PLAINTIFFS DID NOT MAKE A CLAIM FOR UNINSURED MOTORIST BENEFITS WITHIN THE ONE YEAR CONDITION CONTAINED IN THE CONTRACT. NOR DID PLAINTIFFS FILE SUIT WITHIN ONE YEAR UNDER AN ALTERNATIVE REQUIREMENT OF THE CONTRACT'S CONDITIONS. DID THE TRIAL COURT COMMIT ERROR REQUIRING REVERSAL BY DENYING CONTINENTAL'S MOTION FOR SUMMARY DISPOSITION BASED ON THE PLAINTIFF'S FAILURE TO MAKE A TIMELY CLAIM FOR UNINSURED MOTORIST BENEFITS.

The Trial Court said:	**"NO"**
The Court of Appeals said:	**"NO"**
Plaintiffs/Appellees answer:	**"NO"**
Defendant/Appellant answers:	**"YES"**

STATEMENT OF FACTS

On or about May 15, 1998, Plaintiffs' were involved in an automobile accident with tortfeasor Charlene Denise Haynes. At the time of the accident plaintiff's were insured with defendant Continental Insurance Company, a CNA Company.

On or about September 21, 1999, Plaintiffs filed a first party suit against CNA Insurance Company for no fault benefits as well as a third party suit seeking non-economic damages against Charlene Denise Haynes, the driver of the other automobile involved in the accident. During the course of discovery it was determined that Charlene Denise Haynes was uninsured. This was determined by failure of Ms. Haynes to respond to the lawsuit after she was served with notice and defaulted. On March 14, 2000, plaintiffs sent CNA Insurance Company a letter indicating their desire to make a claim for uninsured motorist benefits. After CNA denied benefits, on August 18, 2000 plaintiffs filed another suit against CNA seeking uninsured motorists benefits.

On February 16, 2001(6 months after filing of complaint), defendant's Motion for Summary Disposition is orally argued in front of the trial judge. The Motion is based on a provision in the insurance policy regarding the time in which to file a claim or suit. Specifically, under the policy pertaining to uninsured motorist benefits it states:

"Claim or suit must be brought within 1 year from the date of accident."

After oral argument, the trial judge issued an opinion on June 6, 2001. In its opinion, in addition to citing **Morely v Automobile Club of Michigan** 458 Mich 459; 581 NW2d 237 (1998) and **The Tom Thomas Organization, Inc. v Reliance Ins. Co.**, 396 Mich 588, 592; 242 NW2d 396 (1976); the trial court based its decision on **Timko v**

Oakwood Custom Coating Inc., 244 Mich App 234; 625 NWd 101 (2001) and

Herweyer v Clark Highway Services, Inc. 455 Mich 14.564 NW2d 857 (1997). The trial court further held in its opinion,

> " Here the plaintiffs gave their insurance carrier notice of an uninsured motorist claim one year and ten months after the accident. This is over one year less than the plaintiffs would have by statute to file a third party negligence lawsuit against the negligent driver, wherein the plaintiff would ascertain whether the tortfeasor was in fact insured or uninsured. Consequently, the shortened period of limitations in this case acts as a practical abrogation of the right of action, and also bars the action before the loss or damage can be ascertained. As such, the shorter period of limitation in this matter is unreasonable."

Subsequently an unpublished Circuit Court of Appeals decision was released on April 23, 2002 **Carvan Williams v Continental Ins. Co.**, Docket # 229183. Based upon the **Williams** decision defendant again filed a Motion for Summary Disposition.

Again, the trial judge denied defendant's Motion for Summary Disposition which springboards defendant's application for leave to appeal to the court of appeals. The appellate court grants interlocutory leave to appeal and after oral argument affirms the circuit court decision based upon "reasonableness." In its opinion the court of appeals states:

> "Applying the standard set forth in **Camelot**, supra at 127, and repeated in **Herweyer** and **Timko**, we conclude that the limitation here is not reasonable because, in most instances, the insured (1) does not have "sufficient opportunity to investigate and file an action," where the insured may not have sufficient information about his own physical condition to warrant filing a claim, and will likely not know if the other driver is insured until legal process is commenced. (2) under there circumstances, the time will often be "so short as to work a practical abrogation of the right of action," and (3) the action may be barred before the loss can be ascertained.

This court has granted leave to appeal the lower courts decisions denying defendant's Motion for Summary Disposition.

Standard of Review

As stated by the appellant, the grant or denial of a motion for summary disposition is reviewed by this court under a de novo standard. **Maiden v Rozwood**, 461, Mich 109, 119; 597 NW2d 817 (1999).

The Standard of Review on Motions brought pursuant to MCR 2.116 (C) (7) is that the trial court must accept all of plaintiff's well-plead allegations as true and construe them most favorably to the plaintiff. **Hanson v Upper Peninsula Power Co.**, 144 Mich App 138, 140; 373 NW2d270 (1985).

With respect to Motions brought pursuant to MCR 2.116 (C) (8) the court reviewing such a motion must rely solely on the pleadings and assume that factual allegations in the complaint are true, along with any inferences or conclusions which may be drawn from those facts. Such a motion should be granted only when the claim is so unenforceable as a matter of law that no factual development could possibly justify the right to recovery. **Blake v Consolidated Rail Corporation,** 129 Mich App 535, 342 NW 2nd 599 (1983).

ARGUMENT

APPELLANT, CONTINENTAL INSURANCE COMPANY, CONTRACTED WITH THE PLAINTIFFS FOR CERTAIN INSURANCE COVERAGES. THE UNAMBIGUOUS CONTRACTUAL LANGUAGE OF THE POLICY REQUIRES THAT INSUREDS CLAIMING UNINSURED MOTORIST'S BENEFITS MUST DO SO WITHIN ONE YEAR FROM THE DATE OF THE ACCIDENT OR BRING SUIT WITHIN ONE YEAR FROM THE DATE OF THE ACCIDENT FOR THESE BENEFITS. IT IS UNDISPUTED THAT THE PLAINTIFFS DID NOT MAKE A CLAIM FOR UNINSURED MOTORIST BENEFITS WITHIN THE ONE YEAR CONDITION CONTAINED IN THE CONTRACT. NOR DID PLAINTIFFS FILE SUIT WITHIN ONE YEAR UNDER AN ALTERNATIVE REQUIREMENT OF THE CONTRACT'S CONDITIONS. DID THE TRIAL COURT COMMIT ERROR REQUIRING REVERSAL BY DENYING CONTINENTAL'S MOTION FOR SUMMARY DISPOSITION BASED ON THE PLAINTIFF'S FAILURE TO MAKE A TIMELY CLAIM FOR UNINSURED MOTORIST BENEFITS.

The Trial Court said: **"NO"**

The Court of Appeals said: **"NO"**

Plaintiffs/Appellees answer: **"NO"**

Defendant/Appellant answers: **"YES"**

Defendant argues on appeal that the following statute of limitations provision in its insurance policy is unambiguous and reasonable:

"Claim or suit must be brought within 1 year from the date of accident."

The general rule that applicable statute of limitations on uninsured motorist claim is the six (6) year statute of limitations applied for breach of contract MCLA 600.5807

(8). **Jacobs v Alle** 107 Mich at 424, 309 Northwest 627 (1981). Plaintiff should not be expected to give up a greater right allowed by statute MCLA 600.5807 (8) or that is unreasonable.

From the onset the plaintiff/appellees' position has always been that of reasonableness. In so doing the public policy argument most certainly stems from such an argument despite the statement from the Court of Appeals that "questions of ambiguity and public policy are not at issue. Appellant has cited the underlying case in support of its position: **Morely v Automobile Club of Michigan** 458 Mich 459; 581 NW2d 237 (1998) and **The Tom Thomas Organization, Inc. v Reliance Ins. Co.**, 396 Mich 588, 592; 242 NW2d 396 (1976); **Hellebuyck v Farm Bureau Gen. Ins.** 262 Mich App 250 - 685 NW2d 684 (2004), and **Carvan Williams v Continental Ins. Co.**, an unpublished Court of Appeals decision released April 23, 2002; Docket No. 229183 and **Wilke v Auto Owners Insurance Company** 469 Mich 41 664 NW2d 776 (2003) (3A).

In **Morely**, Insured made a claim for uninsured coverage **over three years** from the date of accident. The insurance policy had a three year statute of limitation period in which to make a claim. This court held that the three year statute of limitations period was enforceable and unambiguous. Since the statute of limitations in **Morely** was three years(as opposed to 1 in the case at hand) the issue of reasonableness was never addressed by this court in reaching its decision. Although the **Morely** decision lessens the general 6 year limitation, it falls in line with the 3 year limitation applicable to a similarly situated third party tort action. Thus, no right is

actually lost.

The **Toms**, case also addressed the issue of a shortened statute of limitations. It held:

> **We adopt the approach of the New Jersey Supreme Court. The appropriate resolution is to allow the contractual period of limitation to run from the date of casualty or, as provided in this policy, discovery of the loss, but to toll the running of the limitation from the time the insured gives notice until the insurer formally denies liability. Toms at 400.**

In both cases this court did not address the issue of reasonableness because the limitations period was not shortened to an unreasonable time frame unlike the 1 year limitation as in the case at hand. The issue of reasonableness in those cases did not mandate the need to be addressed.

In **Hellebuyck v Farm Bureau Gen. Ins.** and **Carvan Williams v Continental Ins. Co.**, the holdings were solely based on whether the language (similar to language of case at hand) was ambiguous. Ambiguity was never the issue before this court. Both the **Hellebuyck and Williams**, holdings "missed the boat." Both decisions were based upon the holding of this court in **Morely**. As pointed out above, although **Morley** stated the contract provision was not ambiguous and upheld the provision, said decision was based upon a 3 year limitation not a 1 year limitation. Thus, the **Williams and Hellebuyck** decisions were not based upon "apples to apples" reasoning.

In **Wilke**, a dispute arose between the insured and insurers regarding interpretation of underinsured - motorists coverage. This court held:

> Quite simply, if ¶4(a)(1) appears ambiguous by itself, when read

> with ¶ 4(b)(2) and (3) the ambiguity is eliminated. That being the case, the insurance contract at issue is unambiguous and should be enforced as its terms dictate. Thus, no consideration of the doctrine of construing the contract against the drafter is appropriate.

The **Wilke** Court further held:

> The rights and duties of parties to a contract are derived from the terms of the agreement. **Evans v Norris**, 6 Mich 369, 372 (1859).. As this court has previously stated, "The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." **Terrien**, supra at 71, quoting **Twin City Pipe Line Co v Harding Glass Co**, 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931). [25] Under this legal principle, the parties are generally free to agree to whatever they like, and, in most circumstances, it is beyond the authority of the courts. [26] to interfere with the parties' **[Page 63]** agreement. **St. Clair Intermediate School Dist v Intermediate Ed Ass'n**, 458 Mich 540, 570-572; 581 NW2d 707 (1998). Respect for the freedom to contract entails that we enforce only those obligation actually assented to by the parties. **Evans**, supra at 372. We believe that the rule of reasonable expectations markedly fails in this respect.

However, **Wilke** is distinguishable from the case at hand in that the issue in **Wilke** was the interpretation of a contract provision and what each party reasonably expected from that provision. This court refused to analyze the language any other way because it didn't have to. The provision did not conflict with any other legislative statute that would create a different result, as in the case at hand. This writer understands the dangers of the reasonable expectation doctrine and the latitude it would allow judges to fit their agenda. However, this court must look to the flip side to the extent how the reasonable expectation doctrine can prevent an insurance company from using it as a

sword and shield. Reasonableness of a contract has its place in certain situations. Here, reasonableness is preventing an insurance company from getting around a legislative statute creating a 3 year statute of limitations for non-economic liability and damages. (Third party claim). An uninsured motorist claim is the same as a 3rd party claim in that a plaintiff must still prove liability and permanent impairment of a bodily function pursuant to MCLA 500.3135. Elimination of the reasonable expectations theory creates a loophole in this case and every other case where statute of limitations are shortened by contract. This writer fully understands that this is a contracted provision. However, when insurance is **mandatory** the parties should be able to contract "**freely**", as this court noted in **Wilke**. As this court well knows, insurance contracts are not negotiable. You either take it or leave it, and we cannot leave it because then we would be in violation of a law mandating insurance coverage. Thus, in the case at hand, reasonableness was accurately analyzed by the trial court and court of appeals, which correctly addresses public policy concerns, and the reasonable expectation theory. Otherwise an insured would never be able to freely negotiate an insurance contract, under our present system.

This courts decisions in **Toms and Morley** did not address the issue of reasonableness because in both cases the limitation period extended beyond one (1) year. The **Williams and Hellebuyck** panels incorrectly applied the reasoning as set by **Toms and Morley**. Those decisions had reasonableness in mind because the insured did not give up a greater right as mandated by statute. **Williams and Hellebuyck** were purely made based upon ambiguity with no thought as to reasonableness. Thus,

this courts rulings in **Toms and Morley** were based on sound reasoning with all factors in mind and therefore should not be disturbed. The trial court and the Court of Appeals correctly factored the above cases which gave rise to an analysis that was consistent with legislative enactment. If this Honorable court decides otherwise then an Insurance Company could reduce the statute of limitation period to file an Uninsured Motorist or similarly situated contracted claim to any time period they choose. This action would completely disregard legislative intent effectively giving an insurance company more power than the lawmakers and the people who vote them in. This is what defendant/appellant wants this court to opine; which makes no sense whatsoever. Laws must be followed and reviewed as time evolves. Ironically, it is the insurance industry that has created the need and/or evolution of uninsured and underinsured motorist coverage. Since insurance coverage is mandatory and cost of obtaining same is continually increasing more and more drivers cannot afford same. This court need only look to District Court Dockets to get an idea of how many people do not have insurance coverage on their vehicle. High costs of obtaining same is certainly high on the list of reasons. As a result, uninsured motorist and underinsured motorist coverage has become vital if not critical. Thus, to allow an insurance company to intentionally disregard legislative statutes and to have this disparity in bargaining power is not fair and surely against legislative intent and public policy.

The issue of reasonableness is not a novel issue. In **Camelot v St. Paul Fire and Marine Insurance Co**. 410 Mich 118 127; 301 NW2d, 275 (1981) the court held:

We held that parties may contract for a period of limitation shorter than the applicable statute of limitations. Id. at 125. The limitation period must be reasonable. Id. at 126. It is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained. Id. at 127.

There are several policy reasons underlying the adoption of statutes of limitation. They protect defendants' rights by eliminating stale claims, shielding defendants from protracted fear of litigation, and ensuring that they have a fair chance of defending themselves. Chase v Sabin, 445 Mich 190, 199; 516 NW2d 60 (1994); Bigelow v Walraven, 392 Mich 566, 576; 221 NW2d 328 (1974). Statutes of limitation are also constructed to give plaintiffs a reasonable opportunity to bring suit. Chase, supra.

As stated above, in making a claim for uninsured motorist benefits the insured must still prove its case as if they were suing a third party. The insured still must prove they have suffered a permanent impairment of a body function and/or bodily disfigurement and that their situation falls in the class of uninsured motorist. As this court is well aware of, a person may be involved in an auto accident and said person may not know that they have suffered a permanent impairment of a body function until after one (1) year. This is not so unreasonable. Along the same lines, if an injured party does not become aware that the person is uninsured within one (1) year same should not be restricted and/or penalized by this one (1) year provision, especially when the insured does its due diligence. Plaintiff did not become aware that Ms. Haynes was uninsured until after Ms. Haynes was defaulted after being served. Appellant **briefly** states that the police report put plaintiff on notice of no insurance. With all due respect to defendant, the police report states "**NO Inj**" which this writer

believes to be short for **NO INJURY**. Furthermore, both boxes designated for insurance are empty which means the information on insurance was never obtained. Aside from that, just because your registration states insurance coverage does not mean the insurance is in effect. Far be it for this writer to say, that some people do get insurance and cancel same after there registration is renewed. Prior to that, plaintiff could not claim or file suit for uninsured motorist coverage because the claim had not materialized. One cannot file a claim or suit that is not ripe. This could have **only** been ascertained upon deposition or interrogatories of Charlene Haynes. When defendant did not answer or defend, it became apparent that Ms. Haynes may be uninsured. Thus, the time for the one (1) year provision to run should be the time when known. Otherwise, many premature lawsuits would ensue and frivolous sanctions enforced against attorneys. Furthermore, it does not make sense that a statute of limitations begin to run before a claim materializes.

With respect to Amicus Brief filed by Farm Bureau in favor of appellant's position, a brief comment must be made. Farm Bureau discussed "interest at stake" and cites 3 reasons for allowing the 1 year statute of limitations to stand:

(1) it promotes full yet fair recovery ;
(2) it fairly allocates the costs to the premium-paying risk pool closest to the loss; and
(3) it promotes the efficiency of claim handling by correlating medical investigation to the same initial one-year period that is the foundation for no-fault benefits.

With respect to number (1) this reason is no reason because the legislature has already decided 3 years to be given on a 3rd party claim that promotes "full yet fair

recovery" . Item #(2) is irrelevant in that the same allocation would be assessed in a 3 year 3rd party claim. Items #(3) medical investigation may not materialize until after - 1 year but within 3 years . Thus an insurance company would not be subjected to any prejudice in defending its claim. Aside from the above, the Trial Judge in the case at hand said it best when he opined:

> **You have a policy that is within the body of the policy, not necessarily highlighted or in any way, called to the attention of the person that has purchased the insurance that they now have a one year statute of limitations.**
>
> **I mean, it suggests to me that these, I haven't really looked at it in a while but what do they call adhesion clauses that are tucked into documents that are not even highlighted or- and certainly not bargained for in any way by the purchaser of the insurance.**
>
> **I'm sure that, I'm quite confident that the person that bought this policy didn't sit down with the person that sold it to them and said well, how much are you going to discount me given my statute of limitations up from six years to one year. Probably - I could rest assured that never happened.**
>
> **Yeah, this is a significant reduction in the time limit, one that I think is unreasonable in light of even - even with a three year statute of limitations to bring the underlying case. I think it's totally and patently unfair to the plaintiffs, purchasers of this insurance policy that effects, substantially effects their right to bring this case.**

Justice Levin concurring in **Camelot** wrote:

> **The rationale of the rule allowing parties to contractually shorten statutory periods of limitation is that the shortened period is a bargained-for term of the contract. Allowing such bargained-for terms may in some cases be a useful and proper means of allowing parties to structure their business dealings.**
>
> **In the case of an adhesion contract, however, where the party ostensibly agreeing to the shortened period has no real alternative,**

this rationale is inapplicable.

In the case at hand, this contract is adhesive because all people who purchased insurance cannot bargain for a greater period for uninsured motorist benefits. This is true throughout the industry. Thus, the argument that plaintiffs could have gone elsewhere is not applicable. Defendant references that an agreement between parties should not be disturbed. Ordinarily, this writer would agree. However, it is not an agreement when one party has no choice and freedom to contract. An insured **must** carry insurance to drive a vehicle, and to do so would mean entering into an insurance contract with an insurance company. I ask this question to this Honorable Court, "When was the last time you negotiated a provision in an insurance contract?" In fact, one can pay "extra" money for added limits of coverage; But can one pay extra money for added "time" to file suit on a uninsured motorist claim?

In addition to the above, Judge Kolenda, sitting in the Circuit Court for the County of Kent issued an opinion pertaining to a similar issue. The case name is **Moses Robinson et al v Allied Insurance Company**. (1b) In his discussion Judge Kolenda utilizes MCLA 500.2254 in denying defendants insurance company's Motion for Summary Disposition based upon a similar provision in defendant's insurance policy whereby same requires a claim to be filed within one (1) year of the date of the loss. Judge Kolenda references the **Toms** case in reaching its conclusion that MCLA 500.2254 prohibits enforcement of an expired deadline.

CONCLUSION

Defendant, in its insurance contract is trying to decrease a statutory given six (6)

year statute of limitations to one (1) year. If this court allows the one (1) year provision to stand then it would have to allow any lessor time frame stated on an insurance contract. Thus, an insurance company would have the right to dictate its own terms. A dangerous thought in light of the fact that this is a non-negotiable provision. Where does it all end? This court must take into consideration what the legislature has enacted and what the insurance industry does to follow said enactments. This court cannot allow insurance companies the latitude in finding loopholes in prior court rulings and the disregard for legislative enactments. The same rulings and enactments that were designed to cement all inconsistencies.

Plaintiff did not discover the tortfeasor Haynes was uninsured until after one year and before three years. The fact that one may not discover same has suffered a permanent impairment of body function until after one (1) year would deem this one (1) year provision extremely harsh. It doesn't stand to reason and it was not the legislative intent that every time someone has an accident to automatically file a lawsuit for uninsured benefits and third party benefits. Three (3) years was the number the legislators enacted for a third party statute of limitations. This gives all parties the time to sort out and discover their options. This is reasonable compared to one (1) year as stated in the insurance contract. The lower courts realized that the provision in the policy shortening the statute of limitations was unreasonable and thus made the right decision. To allow the insurance company to solely determine what time frame is reasonable is extremely unfair, unconscionable, disrespectful, and puts plaintiff insured at a major disadvantage. Plaintiffs have argued all along that a three year statute of

limitation period to bring an uninsured motorist claim is fair and reasonable because it corresponds to the statutory three year limitation for all third party auto negligence cases. Furthermore, there is no bargaining position for an insured. This court should mandate consistency in insurance contracts with statutes. This defendant is trying to get around the 3 year statute of limitations for a 3rd party claim and to top it all off capitalize on it at the expense of the already heavily underhanded insured. The above argument along with Judge Kolenda's use of MCL 500.2254 and this own courts reasoning in **Toms and Morley** mandates affirmation of the lower courts decision.

RELIEF REQUESTED

WHEREFORE, plaintiffs-appellees respectfully requests that this Honorable Court deny defendant/appellant request for reversal and affirm the Trial Court decision and the Court of Appeals published opinion.

Respectfully submitted,

By: _____

DAVID D. TURFE, (P44591)
Attorney for Plaintiff
29900 Harper Ave., Ste. E
St. Clair Shores, MI 48082
(586) 415-4900
Dated: January 31, 2005